

The Sixth Circuit's Approach to the Public-Policy Exception to the Enforcement of Labor Arbitration Awards: A Tale of Two Trilogies?*

I. INTRODUCTION

Section 301(a) of the Labor Management Relations Act¹ makes collective bargaining agreements entered into by employers and unions enforceable in the federal courts. In the *Lincoln Mills*² and *Steelworkers Trilogy*³ cases, the Supreme Court construed this section as announcing a national policy favoring the peaceful, contractual resolution of disputes, and that the use of arbitration as a means of resolving any contractual disputes, in place of measures which tend to cause industrial destabilization, i.e. strikes or lockouts, was especially favored. In the cases that comprise the *Trilogy*, Justice Douglas used broad, idealistic imagery to support the Court's expansive interpretation of section 301.⁴ Viewing the benefit as one accruing primarily to the union, the Court implied a no-strike clause even in its actual absence, declaring that it serves as the quid pro quo for the arbitration clause.⁵ The legal result of the *Trilogy* was a message to the

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¹ 29 U.S.C. § 185(a) (1995).

² *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957) (holding that parties to a collective bargaining agreement can seek enforcement of its terms, including arbitration provisions, in federal district court and announcing that the federal courts were to create a body of federal common law for labor arbitration).

³ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (holding that the strength of a grievance is not a factor to be considered by a court in deciding whether to order compliance with an arbitration clause); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (holding that doubts concerning the contractual arbitrability of a particular grievance should be resolved in favor of arbitration); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (holding that courts are to defer to an arbitrator's decision so long as it derives its "essence" from the agreement).

⁴ *E.g.*, "The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant A collective bargaining agreement is an effort to erect a system of industrial self-government." *Warrior & Gulf Navigation Co.*, 363 U.S. at 579-80.

⁵ *Lincoln Mills*, 353 U.S. at 455. An employer can, therefore, sue the union for damages in the event of a breach. *See Local 174, Int'l Bd. of Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). In *Boys Markets, Inc. v. Retail Clerks Union*, *Local 770*, 398 U.S. 235 (1970), the Court carved out an exception to the Norris-LaGuardia Act, holding that an

lower courts that they were to overcome any prejudice they may have towards arbitration, and, moreover, that they were to enforce arbitration clauses and arbitration awards except under a few, narrow circumstances.

The practical result of these cases has been widespread use of arbitration⁶ and a substantial reduction in strike activity.⁷ Both employers and unions have, for the most part, found that the use of arbitration and the grievance process in general, produces tangible and intangible benefits. The presence of a contract and a predetermined system for dispute resolution (i.e., arbitration) lends stability and predictability to the relationship. Also, the system is generally more cost-effective for the parties than is litigation or resort to economic force.⁸ Finally, the system is quick, or meant to be so,⁹ with the intended result that the parties can move on to other disputes.

employer can obtain an injunction against a strike if it occurs during the term of a collective bargaining agreement containing an arbitration provision, causing the union to be subject to a contempt order if it continues to strike. The Court subsequently held in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974), that so long as the matter is even *arguably* subject to arbitration, an injunction can issue. Thus, employees who refuse to work in protest of unsafe conditions can be jailed for contempt of court. For discussion and criticism of this judicial activism, see JULIUS G. GETMAN & BERTRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 178-82 (1988).

⁶ Approximately 96% of collective bargaining agreements contain an arbitration clause. ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 745 (11th ed. 1991).

⁷ There are, however, a number of other reasons for this decline, including the overall percentage decline in union representation, the likelihood of losing one's job to a permanent replacement during a strike, and the ability of employers to prepare for and work around strikes. Craig Becker, "*Better Than a Strike*": *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 353 (1994) (discussing different reasons for the decline and noting that "the potency of the strike has been annihilated"); Steven Greenhouse, *Strikes at 50-Year Low*, N.Y. TIMES, Jan. 29, 1996, at A12 (noting that insecurity in a worsening economy and fear of losing one's job to a permanent replacement during a strike are key considerations).

⁸ Exception must be made here for unions (and some employers) that do not have the financial wherewithal to pay for their share of an arbitrator's fee or for the services of a lawyer to represent them in the arbitration. See THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON?* 164-68 (1991) (discussing the financial impact of arbitrations on cash-strapped local unions). For them, contracts can go unenforced because the union cannot afford enforcement. Were they permitted to engage in wildcat strikes and forego a day's pay rather than expend several thousand dollars for an arbitration, the contract might be enforced.

⁹ See AFL-CIO, *Arbitration Association Plan Program to Speed Simple Grievance Cases*, Daily Lab. Rep. (BNA) D16 (May 31, 1995) (discussing a plan by which stream-lined arbitration procedures will be developed to make the process quicker and cheaper than it currently is).

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These benefits, however, are largely premised upon judicial deferral to the ultimate findings and holding of the arbitrator, i.e., finality. The Court addressed this issue in *United Steelworkers v. Enterprise Wheel & Car Corp.*,¹⁰ where it held that the proper role of a judge forced to review an arbitration award for purposes of enforcement is to defer to the award. While the Court provided several reasons for this, the key practical reason is conservation of resources. Once judicial review enters the mix, an arbitration proceeding becomes just one more step in protracted litigation of the dispute,¹¹ and the process becomes neither quick nor cheap. The benefits from quick dispute resolution vanish as motions are filed and appeals docketed. Further, the Court's attempt to remove the use of economic weapons from the resolution of disputes fails as well where one side, typically the employer, has the financial wherewithal to expend large sums of money in litigation over the arbitration award and beat the other side, typically the union, into submission.¹² Litigation as an economic weapon is being used more frequently as losing parties refuse to abide by the outcome of arbitration awards and force litigation on the issue.¹³

One of the most popular¹⁴—and uncertain—bases upon which awards are challenged is that they contravene public policy and are, therefore,

¹⁰ 363 U.S. 593 (1960).

¹¹ "Arbitration will not work if legal contests are its bookends: a suit to compel or prevent arbitration, the arbitration itself, and a suit to enforce or set aside the award. Arbitration then becomes more costly than litigation, for if the parties had elected to litigate their disputes they would have had to visit court only once." *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 916 F.2d 1161, 1163 (7th Cir. 1990).

¹² When confronted with a union's request for attorney's fees expended in a suit to enforce an arbitration award, Judge Posner stated:

We share with the union and the district court concern lest companies defeat the objectives of labor arbitration clauses that they have voluntarily negotiated by routinely refusing to honor such awards without any valid grounds for doing so, in order to put the union to the expense of getting the award enforced in court.

Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1168 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (noting that the Seventh Circuit will scrutinize arbitration-enforcement cases to determine the propriety of sanctions); *see also* Douglas E. Ray, *Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards*, 64 IND. L.J. 1, 12-13 (1988) (demonstrating time delay caused by litigation over awards).

¹³ *See* Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78, 118 (1991) (noting that results of empirical study indicate a dramatic increase in "appeals" of labor arbitration awards during the 1980's).

¹⁴ *Id.* at 88-92 (noting trend toward increased use).

unenforceable by the courts.¹⁵ While the courts have long had a general equitable power to refuse enforcement of public-policy-offending contracts,¹⁶ the Supreme Court did not address the doctrine's applicability to labor contracts until 1983.¹⁷ When confusion resulted and splits between the circuits developed as to the breadth of this public-policy exception, the Court addressed the issue again in *United Paperworkers International Union v. Misco, Inc.*,¹⁸ which was expected to be the definitive word on the subject. It was not. As a result, there continues to be disagreement among the circuit courts as to how expansive—or narrow—the parameters are for judges to vacate awards on this basis.¹⁹ Given that the Court had two chances within four years to give guidance and that pronounced differences in interpretation have remained unresolved for almost a decade, it is almost certain that the Court will not revisit the issue. Instead, there will be splits between the circuits, and even potentially within the circuits, which will remain.

This Note examines how the Sixth Circuit has interpreted the public-policy exception and how its view fits within the broader debate over the permissible scope of this review. Part II looks at the Supreme Court's decisions in *W.R. Grace* and *Misco* and the ensuing debate over interpretation in the lower courts. Part III examines the approach of the Sixth Circuit and concludes that the court has adopted the narrow-review standard favored by the D.C. and Ninth Circuits. Part IV examines the potential bases upon which the Sixth Circuit's public-policy jurisprudence is based and argues that it coincides with developments in the law surrounding arbitration under the Federal Arbitration Act—the development of the so-called “second *Trilogy*” that began in the mid-eighties.²⁰ Part V concludes.

¹⁵ See *infra* text accompanying notes 25-28 (discussing other grounds for challenge).

¹⁶ RESTATEMENT OF CONTRACTS §§ 512, 598 (1922); 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1373 (1962); 3 SAMUEL L. WILLISTON, THE LAW OF CONTRACTS § 1628 (1922).

¹⁷ *W.R. Grace & Co. v. Local Union 759, United Rubber Workers*, 461 U.S. 757 (1983).

¹⁸ 484 U.S. 29 (1987).

¹⁹ See *infra* notes 44-77 (discussing the debate in the circuit courts).

²⁰ See David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, ARB. J., Sept. 1993, at 19 (citing Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985)).

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II. THE PUBLIC-POLICY EXCEPTION TO AWARD ENFORCEMENT

A. W.R. Grace *and* Misco

In *Enterprise Wheel*²¹ the Court set forth the proper role for a court in reviewing an arbitration award:

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.²²

Further, the Court stated that a court may not reconsider the merits of an award even when the parties allege that the award rests upon an error in fact-finding or a misinterpretation of the contract: "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."²³ The degree of deference that courts are to give to a challenged arbitration award is described as "one of the narrowest standards of judicial review in all of American jurisprudence."²⁴

This does not, of course, mean that there are no means by which a court can review an award. The Court noted in *Enterprise Wheel* that "when the arbitrator's words manifest an infidelity to [the obligation to interpret the terms of the agreement], courts have no choice but to refuse

²¹ 363 U.S. 593 (1960).

²² *Enterprise Wheel*, 363 U.S. at 596. "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party was right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, *when it was his judgment and all that it connotes that was bargained for.*" *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (emphasis added).

²³ *Misco*, 484 U.S. at 38 (1987) ("Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").

²⁴ *Lattimer-Stevens Co. v. United Steelworkers*, Dist. 27, 913 F.2d 1166, 1169 (6th Cir. 1990).

enforcement of the award."²⁵ Likewise, parties cannot be forced to arbitrate matters which they have not agreed to arbitrate.²⁶ In addition, the Federal Arbitration Act (FAA)²⁷ provides that courts may vacate awards when there is the presence of fraud, misconduct, or bias on the part of the arbitrator or the parties.²⁸ Review in these situations protects the integrity of the parties'

²⁵ *Enterprise Wheel*, 363 U.S. at 597. "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* See also *Cement Divs., National Gypsum Co. v. United Steelworkers, Local 135*, 793 F.2d 759, 766 (6th Cir. 1986) (setting forth a four-part test to determine an arbitrator's fidelity to the parties' contract).

²⁶ *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *United Steelworkers v. Mead Corp., Fine Paper Div.*, 21 F.3d 128, 131-32 (6th Cir. 1994); see also *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995) (holding that the Federal Arbitration Act provides that courts are to decide arbitrability issues absent a clear indication that the parties intended that the arbitrator decide them).

²⁷ 9 U.S.C. § 1 (1994).

²⁸ 9 U.S.C. § 10(a)(2) (1995) (courts may vacate an award when "there was evident partiality or corruption in the arbitrators"); 9 U.S.C. § 10(a)(1) (1995) (courts may vacate an award procured by corruption, fraud, or undue means). Although there is disagreement as to its actual application, see *infra* this note, the Supreme Court noted that courts "have often looked to the Act for guidance in labor arbitration cases." *Misco*, 484 U.S. at 40 n.9 (1987). This has long been the practice of the Sixth Circuit, with the result that there are several cases interpreting the FAA in the labor context. *E.g.*, *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1353 n.9, 1358 (6th Cir. 1989) (adopting "reasonable person" standard in judging partiality), *cert. denied*, 495 U.S. 947 (1990).

As previously noted, there is a split in the circuits as to the applicability of the FAA to arbitration provisions in collective bargaining agreements, due to language in the Act which makes it inapplicable to "contracts of employment of seamen, railroad employees, or any other class or workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1995). See generally IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* §§ 11.1-11.7 (1995) (discussing issues surrounding applicability). The Sixth Circuit recently distinguished a line of labor and employment cases and stated that the FAA *does* apply to all employment contracts, except for those pertaining to employees in the transportation industry. *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995) (individual employment contract held to be subject to FAA). This case may not control in the labor context, however, because discussion of the applicability of the FAA to collective bargaining agreements was dictum. For a Sixth Circuit case explicitly holding that the FAA is *inapplicable* to collective bargaining agreements, see *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 404-05 (6th Cir. 1988) (distinguished in *Bates*).

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bargain from the chance encounter with a renegade arbitrator or from a fraudulent determination.

In 1983, the Court recognized the applicability of a public policy exception to the general rule of judicial deference to the arbitral award.²⁹ In *W.R. Grace & Co. v. Local 759, United Rubber Workers*,³⁰ the Court stated that courts may refuse to enforce collective bargaining agreements—and by implication arbitral awards that derive from them—that run contrary to public policy. At issue in *W.R. Grace* was a conciliation agreement entered into by the employer which settled an EEOC investigation into violations of federal civil rights law. The agreement, however, caused some employees to lose seniority, and the employees' union grieved this loss of seniority. An arbitrator found that the employer's action had violated the terms of the collective bargaining agreement between the employer and the union and ordered that the employer compensate the employees for this loss. The employer sought judicial review of the arbitrator's award, alleging that the award violated public policy and was therefore unenforceable by the Court. The policies alleged to have been violated were: 1) obedience to judicial orders and 2) voluntary compliance with Title VII.

The Supreme Court agreed with the employer that there does exist a public-policy exception to a court's enforcement of the terms of a collective bargaining agreement, including those manifested by means of an arbitrator's findings and award. The Court's opinion made clear that this was not any new exception to the rule of deference established in *Enterprise Wheel*, but rather that the federal courts have always had the obligation to refuse to enforce contracts that violate an "explicit public policy." The Court attempted to define this amorphous concept as a policy "well defined and dominant, and . . . ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"³¹ Although the Court noted that both policies proffered by the employer passed the test the Court put forth, it held that neither of them would be violated by enforcement of the arbitration award. As the Court stated, "[t]he dilemma . . . was of the company's own making" in that it voluntarily committed itself to "conflicting contractual obligations," which,

²⁹ This is not to suggest that some courts had not understood there to be such an exception previously. *E.g.*, *United Auto Workers, Local 985 v. W.M. Chace Co.*, 262 F. Supp. 114, 117-18 (E.D. Mich. 1966) ("[I]t is too plain for argument that no court will order a party to do something, if in order to comply with the court's directive, he must commit a crime.").

³⁰ 461 U.S. 757 (1983).

³¹ *Id.* at 757 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945) (noting that "there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.")).

while painful to the company, did not require it to violate Title VII or the court order in the case.³²

Although *W.R. Grace* did not appear to sanction a broad exception to *Enterprise Wheel*,³³ this is not how many litigants interpreted it.³⁴ Following the Court's decision, "it seemed as though the floodgates to the federal courts had opened wide"³⁵ with challenges to arbitral awards on the grounds of a perceived conflict with one public policy or another. Just four years later, with the circuit courts in conflict as to when courts may use this "new" exception to vacate awards, the Supreme Court revisited its holding in *W.R. Grace*.

At issue in *Misco*³⁶ was the discharge of an employee of a paper mill in Louisiana for violating a company rule against workplace possession or consumption of illegal drugs. The employee's union grieved his discharge, claiming that the employer lacked authority under the collective bargaining agreement, i.e., just cause, to discharge the employee in this circumstance. The matter went to arbitration, as provided for in the agreement. The arbitrator found that cause was lacking and awarded the employee reinstatement with backpay. The company filed suit against the union in district court seeking to vacate the award on the grounds that ordering the employee reinstated violated the "public policy against drugs in the workplace." The district judge agreed and vacated the award.³⁷ The union then appealed to the Fifth Circuit, which affirmed. The Fifth Circuit opinion decried the arbitrator's "whimsical" decision: "Gazing at the trees, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy."³⁸ The court

³² *W.R. Grace*, 461 U.S. at 767-70.

³³ "It is not at all clear that the reference to 'public policy' in *W.R. Grace* denotes anything more or different than what the courts have said over the years in construing *Enterprise Wheel*." *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) (footnote omitted).

³⁴ Its popularity may also derive from the fact that it is often the only argument the obstinate party may invoke to challenge an award because it may be used even after the statute of limitations has run. This is because it derives not from a right possessed by a party, but rather from a court's jurisdictional limit. *See Occidental Chem. Corp. v. Int'l Chem. Workers Union*, 853 F.2d 1310, 1317 (6th Cir. 1988).

³⁵ William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 477 (1989).

³⁶ 484 U.S. 29 (1987).

³⁷ *Id.* at 34.

³⁸ *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739, 743 (5th Cir. 1985), *rev'd*, 484 U.S. 29 (1987).

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found the *Muschany* requirement of a well-defined and dominant public policy satisfied by reference to "the Louisiana law against possession of marijuana and the public policy, embodied in the employer's rule, against introduction of drugs in the workplace and consequent operation of dangerous machinery by persons under their influence."³⁹ The union appealed to the Supreme Court, which unanimously reversed.

The question on which the Court granted review was the union's contention that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law or compels conduct by the employer that would violate the law.⁴⁰ The Court did not address that contention,⁴¹ however, instead re-emphasizing that the general rule, per *Enterprise Wheel*, is deferral and that courts can use the public-policy exception only when the conditions of *W.R. Grace* are met. The Court pointed out that *W.R. Grace* did not "sanction a broad judicial power to set aside arbitration awards as against public policy."⁴² The Court also noted that the Fifth Circuit's position placed it within the group of circuits which sanctioned "broad review," as contrasted with narrow-review circuits like the D.C. Circuit, although it did not specifically take issue with this.⁴³ The Court simply held that no well-defined and dominant public policy was shown to be subject to violation if the award was enforced; mere citation to the drug laws of Louisiana was insufficient. Accordingly, the Court reversed.

B. The Public Policy Exception "Defined" Post-Misco

Because the Court did not explicitly adopt one of the varied approaches that had been theretofore used by the circuit courts in defining the scope of review, the confusion remains. While there is a great variety of approaches among the circuits (and even seemingly between panels of the same circuit),⁴⁴ there are really just two approaches: broad review and narrow

³⁹ *Misco*, 768 F.2d at 741.

⁴⁰ Brief for Petitioners, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (No. 86-651).

⁴¹ *Misco*, 484 U.S. at 45 n.12 ("We need not address the Union's position . . .").

⁴² *Id.* at 43.

⁴³ *Id.* at 35 n.7 (noting that the Fifth Circuit's decision placed it within the group of courts holding a "broader view" of the exception). The author believes that casting the approach of the Fifth Circuit within the group advocating broad review, while acknowledging the presence of another group advocating narrow review, indicates a preference for the latter. This is, however, pure conjecture.

⁴⁴ Both the Third and Eleventh Circuits, at least, have case law containing contradictory reasoning.

review. The former can be characterized as viewing the *W.R. Grace* and *Misco* cases as announcing a new rule in the federal common-law development of labor arbitration. Within this group there seems to be differing analyses, but it is often difficult to nail down exactly what is going on since "public policy" is such a slippery, amorphous concept. In general, those circuits using a broad review interpret the Supreme Court's opinion in *Misco* as imposing a technical requirement on the lower courts; specific laws must be cited in defining the public policy. Less emphasis is placed on the violation step. Courts adhering to this view, to one degree or another, appear to include the First,⁴⁵ Second,⁴⁶ Third,⁴⁷ Fifth,⁴⁸ Eighth,⁴⁹ and Eleventh Circuits.⁵⁰

The narrow-review theory sees *W.R. Grace* and *Misco* as setting forth a very restricted standard for courts to employ in reviewing awards. A common characteristic of these courts is that they strictly employ the *Misco* admonition that the public policy must actually be violated by the award. As a result, there are strange, non-commonsensical arbitral results which are nonetheless enforced because this is the contracted-for result, not because the arbitrator enjoys any common sense. If it is not the contracted-for result, it may be attacked based on the grounds mentioned earlier, but not because of a supposed public policy conflict. Proponents of generally narrow review

⁴⁵ Cf. *North Adams Reg. Hosp. v. Mass. Nurses Ass'n*, 74 F.3d 346 (1st Cir. 1996).

⁴⁶ Cf. *Newsday Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991).

⁴⁷ E.g., *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 346 (5th Cir. 1996).

⁴⁸ E.g., *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir.), *cert. denied*, 114 S. Ct. 441 (1993).

⁴⁹ E.g., *Union Pac. R.R. Co. v. United Transp. Union*, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994).

⁵⁰ E.g., *Georgia Power Co. v. Int'l Bhd. of Elec. Workers Local 84*, 707 F. Supp. 531 (N.D. Ga. 1989) (but purporting to adopt narrow approach), *aff'd*, 896 F.2d 507 (11th Cir. 1990).

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appear to include the Fourth,⁵¹ Seventh,⁵² Ninth,⁵³ Tenth,⁵⁴ and D.C. Circuits.⁵⁵

The distinction between the broad and narrow-review courts can be illustrated by comparing the Eleventh Circuit's opinion in *Delta Air Lines v. Air Line Pilots Association*⁵⁶ and the D.C. Circuit's opinion in *Northwest Airlines v. Air Line Pilots Association*.⁵⁷ The benefit of comparison results from the facts of the two cases being completely indistinguishable. In short, each case concerned a commercial airline pilot who performed the duties of a co-pilot while still intoxicated from heavy drinking the night before. In each case, the pilot was given blood tests to determine intoxication, and in each case the pilot was legally drunk under state law. Because of their actions, the pilots were discharged for violating federal regulations and company policies. Each pilot's union contested his discharge, contending that the airline did not have just cause to terminate, and that he should have been offered the chance to enter rehabilitation. In both cases, the arbitration panels voted to reinstate the employee without backpay or benefits, upon condition that he regain FAA certification to fly. The employers then filed suits in federal court seeking to prevent enforcement of the awards.⁵⁸

At this point, the similarity ends since the courts came out differently. Although each found the arbitration panels to have acted properly and within their contractual authority, they split on the issue of public policy. The D.C. Circuit found the airline's argument on this issue to be "meritless."⁵⁹ Relying upon the Supreme Court's *W.R. Grace* opinion and an earlier decision,⁶⁰ the court examined whether the award at issue violated public policy as divined from positive law and found that it did not.

⁵¹ Cf. *Eastern Associated Coal Corp. v. United Mine Workers, Local 1503*, 125 Lab. Cas. (CCH) ¶ 10,687 (4th Cir. 1993).

⁵² Cf. *Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers*, 959 F.2d 685 (7th Cir.), cert. denied, 506 U.S. 908 (1992).

⁵³ E.g., *United Food & Comm. Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169 (9th Cir. 1995).

⁵⁴ Cf. *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989).

⁵⁵ E.g., *American Postal Workers Union v. United States Postal Serv.*, 52 F.3d 359, 362-63 (D.C. Cir. 1995).

⁵⁶ 861 F.2d 665 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989).

⁵⁷ 808 F.2d 76 (D.C. Cir. 1987), cert. denied, 486 U.S. 1014 (1988). Although decided before *Misco*, the court has retained the same analysis in later cases.

⁵⁸ *Delta Air Lines*, 861 F.2d at 666-69; *Northwest Airlines*, 808 F.2d at 78-80.

⁵⁹ *Northwest Airlines*, 808 F.2d at 82.

⁶⁰ *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1 (D.C. Cir. 1986).

Specifically, the court examined the reinstatement requirement and noted that it was made contingent upon the pilot regaining FAA certification to fly and was thus not illegal: "It would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA recertifying Morrison for flight duty."⁶¹ While noting the employer's need for reasonable safety rules (and the egregiousness of the employee's conduct),⁶² the court noted that it was free to insist on removal of arbitral jurisdiction over cases involving the rules in bargaining with the union. Accordingly, the award was enforced.

The Eleventh Circuit, as noted above, employed a different analysis. Rather than being meritless, it found the employer's argument to concern the "rare example" of an award, the enforcement of which would violate public policy.⁶³ The court attached a great deal of significance to the fact that the employee here was intoxicated while at work, finding that this distinguished the case from *Misco* and a prior Eleventh Circuit case.⁶⁴ Further, the court stated that the arbitrator here had construed the contract such that "Delta has agreed to submit to arbitration the question as to whether it should authorize operation of aircraft by pilots while they are drunk."⁶⁵ However, the reinstatement of the employee here was again conditioned upon recertification by the FAA; no one argued Delta had to let drunks fly the planes. Nevertheless, the court proceeded to analyze legal pronouncements to support its holding. It found state laws criminalizing operation of an aircraft while intoxicated, federal regulations forbidding intoxicated individuals from flying, and caselaw discussing the important public policy underlying safety. In addressing the violation step, the court found it satisfied due to an ability to discover any legal authority stating that the employee's actions are consistent with public policy. "Delta . . . was under a duty to prevent the wrongdoing of which its Pilot-In-Command was guilty, and it could not agree to arbitrate that issue."⁶⁶ The court thus found *Misco* satisfied because of the employee's conduct, exactly the inquiry it stated at the outset it was not undertaking.

The essential difference in the cases is the application of the violation step. The D.C. Circuit found plenty of public policies implicated by the employee's conduct, but none violated because enforcement of the award would not create a conflict with the policy. The Eleventh Circuit, on the

⁶¹ *Northwest Airlines*, 808 F.2d at 83.

⁶² *Id.* at 33 n.84.

⁶³ *Delta Air Lines*, 861 F.2d at 671.

⁶⁴ *Florida Power Corp. v. Int'l Bhd. of Elec. Workers*, 847 F.2d 680 (11th Cir. 1988) (holding that reinstatement of employee discharged for off-duty possession of cocaine does not violate public policy).

⁶⁵ *Delta Air Lines*, 861 F.2d at 671.

⁶⁶ *Id.* at 674.

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other hand, apparently found that the public policy announced in the laws could be violated even without a conflict. This is the essential trait of the broad-review courts: it is the ideal that emanates from the cited laws that forms the relevant public policy.⁶⁷ In *Gulf Coast Industrial Workers Union v. Exxon Co.*,⁶⁸ the Fifth Circuit attempted to demonstrate how the arbitral reinstatement of an employee discharged for cocaine use violated public policy by reviewing federal and state statutes, regulations, and judicial precedents which "condemn the presence of drugs in the workplace."⁶⁹ Among the statutes cited was the Americans with Disabilities Act because drug users are not protected under the Act.⁷⁰ While Exxon would not have been required to perform an illegal act by bringing the employee back to work on its own initiative or indeed for failing to discharge him in the first place, the Fifth Circuit refused enforcement of the award. The result of cases like this is that an employer is "left holding all the cards."⁷¹

Although this approach is the majority view, the narrow-review approach has the overwhelming support of academic commentators⁷² and is the majority view of state courts to consider the issue under state collective bargaining schemes.⁷³ In a recent article, Professor Clyde Summers set forth

⁶⁷ Cf. *Exxon Shipping Co. v. Exxon Seaman's Union*, 993 F.2d 357 (3d Cir. 1993) (in addition to vacation where award violates positive law or requires a party to act illegally, vacation is required when award undercuts or thwarts stated purpose behind statute or regulation).

⁶⁸ 991 F.2d 244 (5th Cir.), *cert. denied*, 114 S. Ct. 441 (1993).

⁶⁹ *Id.* at 250-55.

⁷⁰ *Gulf Coast Indus.*, 991 F.2d at 251.

⁷¹ "If, on the one hand, it wishes to retain an employee who [acts improperly], the courts cannot 'stand in the way.' If, on the other hand, it wishes to ignore a contractual provision requiring it to retain an employee, or a 'just cause' provision requiring it to submit grievances over safety-related discharges to binding arbitration, it will find relief in the courts [of the broad-review circuits]." Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 28 (1988) (footnote omitted).

⁷² See, e.g., *id.*, Ray, *supra* note 12; but see Jesse P. Schaudies, Jr. & Christopher S. Miller, *The Critical Role of a Judicially Recognized Public Policy Against Illegal Drug Use in the Workplace*, 12 INDUS. REL. L.J. 153 (1990).

⁷³ E.g., *American Fed'n of State, County & Mun. Employees v. Illinois Dept. of Mental Health*, 529 N.E.2d 534, 540-42 (Ill. 1988); *Inlandboatmen's Union of the Pacific v. Sause Bros., Inc.*, 881 P.2d 1255, 1261-64 (Haw. Ct. App. 1994); *Lansing Comm. College v. Lansing Comm. College Chapter of Mich. Ass'n for Higher Edn.*, 409 N.W.2d 823 (Mich. Ct. App. 1987), *aff'd on remand*, 429 N.W.2d 619 (Mich. Ct. App. 1988) (upholding reinstatement of professor discharged for smoking marijuana with students and adopting strict violation requirement). But see *Mass. Hwy Dep't v. American Fed'n of State, County and*

two criteria he believed were necessary before an award is vacated on public-policy grounds. "First, the reinstatement should create a substantial threat for the future; it should not be set aside to penalize for the past."⁷⁴ This means that "[p]ublic policy must be a policy which bars *reinstatement*" in that situation.⁷⁵ This is the approach of the narrow-review courts. "Second, the interest to be protected by the court is the public's interest, not the employer's private interest."⁷⁶ Professor Summers notes, however, that adoption of these principles, particularly the second, by a court will not necessarily restrain the court as its action can be phrased such that it obfuscates, albeit unintentionally, its true action.⁷⁷

III. PUBLIC POLICY IN THE SIXTH CIRCUIT

The Sixth Circuit has the "reputation for vacating more arbitration awards than any other circuit."⁷⁸ Given this, one might expect that the court would join the group of circuits which advocate an expansive view of the public-policy exception, but in fact the opposite has occurred, as the Sixth Circuit has adopted a narrow, conservative approach. This section examines Sixth Circuit decisional law interpreting *W.R. Grace* and *Misco*, while the next section discusses possible explanations for the court's seemingly differing approaches to public-policy challenges and the other possible challenges, those which have built the court's reputation. In analyzing the court's approach, the Note discusses reinstatement cases past and future, as

Mun. Employees, Council 93, 648 N.E.2d 430 (Mass. 1995); *Southwest Ohio Reg. Transit Auth. v. Amalgamated Transit Union, Local 627*, No. C-930423, 1994 Ohio App. LEXIS 4319 (Ohio Ct. App. Sept. 28, 1994) (seemingly adopting broad review).

⁷⁴ Clyde W. Summers, *The Trilogy and its Offspring Revisited: It's a Contract, Stupid*, 71 WASH. U. L.Q. 1021, 1054 (1993).

⁷⁵ *Id.* at 1054-55 (emphasis in original).

⁷⁶ *Id.* at 1055.

⁷⁷ Summers, *supra* note 74, at 1055. See, e.g., *Gulf Coast Indus.*, discussed *supra* note 68, where court focuses upon the public hazard posed by a cocaine-using employee working at an oil refinery, rather than the employer's self-interest in firing him.

⁷⁸ Herbert L. Segal, *The United States Court of Appeals for the Sixth Circuit and Arbitration Awards*, in *FOURTH ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE* 206 (Marlin M. Volz ed., 1988). It is estimated that the court vacated about half the arbitration awards presented to it in the mid-1980's. Michael H. Gottesman, *Enforceability of Awards: A Union Viewpoint*, in *ARBITRATION 1988: EMERGING ISSUES FOR THE 1990's* 88, 89 (Gladys W. Gruenberg ed., 1989). But see *LeRoy & Feuille*, *supra* note 13, at 105 (finding in empirical study that in the thirty years since the *Trilogy*, district courts in the sixth circuit enforced awards 72.1% of the time, with the court of appeals enforcing 62.9%; this places the sixth circuit courts below the median, but not at the bottom).

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well as cases founded upon other, non-discharge related provisions of the collective bargaining agreement.

The majority of public-policy cases that seem to find their way to the Sixth Circuit, and indeed to any court, deal with the ordered reinstatement of employees originally discharged for alleged misconduct.⁷⁹ The seminal Sixth Circuit case post-*Misco* is *Interstate Brands Corp. v. Chauffeurs*,⁸⁰ which, like many of the reinstatement cases, deals with the arbitral reinstatement of an employee discharged for drug use. The employee, a delivery driver for a bread company, was a passenger in a car pulled over by police near the Cincinnati airport in northern Kentucky on his day off. The officer approached the car and found the employee "in a disoriented condition with slurred speech and alcohol on his breath," and, moreover, with cocaine, blood, and needle marks on his arm.⁸¹ The officer arrested him for possession of cocaine, marijuana, and drug paraphernalia, all violations of Kentucky law. The prosecutor subsequently offered to drop the charges on condition that he undergo drug rehabilitation, which he did. The individual's employer was not immediately informed, but discharged him indefinitely when it was notified. The employee's union grieved the dismissal up to arbitration pursuant to the collective bargaining agreement's "just cause" requirement for dismissal. The arbitrator found that the employee had indeed used cocaine (something that was contested since he was never actually convicted of possession), but ordered the employee reinstated as the employer had no policy against off-duty drug use by its employees.⁸² The employer refused to comply with the award and sued the union in district court seeking its vacation. The district court vacated the award, stating in dicta that the reinstatement of the employee "violated a well-defined public policy against permitting habitual users of mind-altering drugs from operating motor vehicles."⁸³ The union appealed to the Sixth Circuit, which reversed.

The Sixth Circuit stated that the lower court mischaracterized the issue and "was in actuality evaluating [the employee's] behavior," instead of determining whether the award, "*the contract as interpreted*," violated

⁷⁹ A provision found in most collective bargaining agreements is that the employer can discharge an employee only for "just cause." FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 652 (4th ed. 1985).

⁸⁰ 909 F.2d 885 (6th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).

⁸¹ *Interstate Brands*, 909 F.2d at 887.

⁸² *Id.* at 888.

⁸³ *Id.* The district court cited the laws of Indiana, Kentucky, and Ohio (all of which had connection to the employee's delivery routes) prohibiting driving under the influence of intoxicants.

some explicit public policy.⁸⁴ The court first determined that there was no public policy at stake. While each state did prohibit persons from driving while under the influence of intoxicants, none of them prohibited someone who had been convicted of this offense from ever driving again; such person was only prohibited from driving while his or her license was revoked.⁸⁵ Likewise, the court stated that there is no general public policy against "reinstating an employee [initially] discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances."⁸⁶ Because no public policy was at stake, the inquiry ended without the court having to determine the violation step.⁸⁷

While the court would not categorize itself with respect to the debate in the circuits as to the scope of the policy that can be considered and what constitutes a violation,⁸⁸ it seems to have done so in the following two cases. In *Monroe Auto Equipment Co. v. United Auto Workers, Local 878*,⁸⁹ an employer appealed the district court's confirmation of an arbitration award that ordered it to reinstate an employee discharged for alleged drug use. Among other grounds, the employer argued that reinstatement of the employee violated public policy by "ordering reinstatement and return to the workplace of an employee who admitted using illegal drugs."⁹⁰ The Sixth Circuit disagreed, however, stating that this was insufficient in that the employer had failed to "identify law or legal precedents which indicate that the award violated a well defined and dominant public policy."⁹¹ As in *Interstate Brands*, the court noted the proper inquiry is not whether the employee's conduct was improper, but "whether the arbitrator's award requiring reinstatement of the grievant . . .

⁸⁴ *Interstate Brands*, 909 F.2d at 893.

⁸⁵ *Id.* at 894 (citing to the relevant state laws).

⁸⁶ *Interstate Brands*, 909 F.2d at 894.

⁸⁷ The court also criticized the district court for considering the employee's convictions for reckless driving and DUI on two occasions as part of its public-policy analysis. The arbitrator "made note" of these but determined they were too remote from the incident. It was improper for the district court to consider these because questions of admissibility of evidence are procedural matters to be determined by the arbitrator. Because the arbitrator found them irrelevant, the district court was bound by that determination. *Interstate Brands*, 909 F.2d at 894.

⁸⁸ *Id.* at 893-94 n.11 (noting the split between the Eighth and Ninth Circuits but finding a factual distinction in the case *sub judice* and refusing to announce a position).

⁸⁹ 981 F.2d 261 (6th Cir. 1992), *cert. denied*, 508 U.S. 931 (1993).

⁹⁰ *Id.* at 265.

⁹¹ *Id.* at 269.

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violated some explicit public policy."⁹² In short, there was again no public policy found.

In *Shelby County Health Care Corp. v. American Federation of State, County and Municipal Employees, Local 1733*,⁹³ the court addressed the violation step. The court was faced with an employer's challenge to an arbitrator's award reinstating an employee discharged for her participation in an illegal strike at the employer's facility. Specifically, the strike was conducted in violation of the notice requirements of the 1974 Health Care Amendments to the National Labor Relations Act. Following the employee's discharge, the union grieved the dismissal up to arbitration. The arbitrator reinstated her, citing her long service with the company and the fact that he did not believe she was the chief instigator of the strike. The hospital challenged the award in district court on the grounds that the award violated the public policy established in the Health Care Amendments, which prohibits strikes without notice and provides that employees who illegally strike lose their "employee status," allowing them to be fired by their employer.⁹⁴ The employer argued that the award contravened the statute by not allowing discharge of the employee. The district court agreed, stating that these provisions constituted a well-defined and dominant public policy and that the award directly contravened this policy by not allowing the employer to discharge this employee.⁹⁵ On appeal, the Sixth Circuit agreed that the statutory provisions constituted a public policy but disagreed with the district court as to whether there was a violation.⁹⁶ The court noted that the employee's conduct did indeed run afoul of the NLRA, but that the cited provisions did not remove the employer's discretion in retaining or discharging those employees who illegally strike. Because the employer retained its discretion under the law, that it chose to bargain that away by agreeing to a grievance procedure is not something that concerns public policy. In other words, the *award* did not compel a violation of law. The case was remanded with instructions to enforce the award.⁹⁷

There are other reinstatement situations that the court has yet to review. Two of the most litigated situations deal with sexual harassment and public-safety concerns. First, the arbitral reinstatement of an employee discharged

⁹² *Monroe*, 981 F.2d at 269 (quoting *Interstate Brands*, 909 F. 2d at 893).

⁹³ 967 F.2d 1091 (6th Cir. 1992).

⁹⁴ *Shelby County Health Care*, 967 F.2d at 1092 (citing National Labor Relations Act, 29 U.S.C. §§ 158(d), (158)(g) (1994)).

⁹⁵ *Shelby County Health Care Corp. v. American Fed'n of State, County and Mun. Employees, Local 1733*, 756 F. Supp. 349, 352 (W.D. Tenn. 1991).

⁹⁶ *Shelby County Health Care*, 967 F.2d at 1096.

⁹⁷ *Id.* at 1098.

for sexual harassment has become a contentious issue in the circuits.⁹⁸ The courts that have addressed it have split, essentially over differing interpretations of the breadth of the public-policy exception. The Third Circuit, for instance, found that Title VII creates a *W.R. Grace*-style public policy against sexual harassment in the workplace that is violated by the arbitral reinstatement of a harasser.⁹⁹ This conclusion runs contrary to the analysis used in the Sixth Circuit, however, where no violation can occur unless the award itself violates public policy. If the employer is under a legal obligation to rid itself of that particular employee, or if the arbitrator reinstates the employee while finding that the employee will most likely again perpetrate harassment, then the court might find that such an award will not be enforced. The assertion, however, that reinstatement of a harasser might subject the employer to Title VII liability for maintaining a hostile workplace environment should not be sufficient because the employer is free to make violation of a sexual harassment policy mandatory cause for discharge in the collective bargaining agreement.¹⁰⁰ Given the opportunity to review such a case, the Sixth Circuit should be expected to follow its *Interstate Brands* analysis.

Another situation that has not been squarely addressed by the court is what has been styled as the "public safety," public-policy case, where reinstatement of an employee who acted negligently at work is alleged to be unenforceable because public safety is endangered.¹⁰¹ It is, of course, important for courts to consider the public's interest when a private contract, such as a collective bargaining agreement, creates significant

⁹⁸ Compare *Newsday*, 915 F.2d 840 (victim a co-worker; violates public policy) and *Stroehmann Bakeries v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir.) (victim an employee of customer; violates public policy), *cert. denied*, 506 U.S. 1022 (1992); *United Transp. Union v. Burlington N. R.R. Co.*, 864 F. Supp. 138 (D. Or. 1994) (victim a co-worker; violates public policy) with *Chrysler Motors Corp.*, 959 F.2d 685 (7th Cir. 1992) (victim a co-worker; does not violate public policy) and *Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) (victim a customer; no violation) See also Chris Baker, Comment, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. CIN. L. REV. 1361 (1993) (addressing both sides and concluding that there is not a public-policy violation).

⁹⁹ *Stroehmann Bakeries*, 969 F.2d at 1441 (2-1 decision).

¹⁰⁰ See Edwards, *supra* note 71, at 28-29. The employer must be careful, however, that this is specifically established in the agreement and should not be a matter that is subject to arbitral review. *Bruce Hardwood Floors v. Southern Council of Indus. Workers*, 8 F.3d 1104 (6th Cir. 1993). *Contra Delta Queen Steamboat Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599 (5th Cir. 1989) (allowing less discretion on part of arbitrator in finding discretion at edges of agreement), *cert. denied*, 498 U.S. 853 (1990).

¹⁰¹ E.g., *Delta Airlines*, 861 F.2d 665; *Iowa Elec. Light & Power Co. v. Local Union 204, Int'l Bhd. of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987) (reinstatement of nuclear power employee who violated safety rule at plant violates policy favoring public safety).

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externalities felt by the public at large.¹⁰² A narrow approach does not, however, amount to an abrogation of the concern judges have in watching out for the interests of society. Both parties, the employer and the union, have operated in an area of private law carved out for them by Congress, and it is the employer, not society, that will suffer from the employer's agreement to have its authority to discharge tempered by a "just cause" requirement and arbitration. Some courts, however, have been receptive to employer allegations of threats to public safety and have used *Misco* as a back door means of refusing to enforce awards reinstating employees who were discharged for committing admittedly negligent acts.¹⁰³ This technique is often used in drug cases, where an award reinstating a drug-using employee is not enforced because of concern that an industrial accident could occur in the future due to his intoxication. In other words, these courts are again focusing upon the employee's conduct, rather than the real issue: does the award—not the conduct—violate public policy?¹⁰⁴

This is how the Sixth Circuit will likely frame the issue in this situation and others that will arise in the future. This analysis has been summarized as follows: "If under a given collective bargaining regime, higher management would have the legal right to reverse an initial decision to discharge an employee because of conduct violating public policy, then an arbitrator's award to the same effect, if based on the contract, should be enforced."¹⁰⁵ In other words, if the employer has agreed to a just cause

¹⁰² Stephen R. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, in *ARBITRATION 1987: THE ACADEMY AT FORTY 25*, 27-29 (Gladys W. Gruenberg ed., 1988) (noting judicial concern).

¹⁰³ See *Stead Motors v. Automotive Machinists Lodge No. 1173*, 843 F.2d 357 (9th Cir. 1988) (holding that policy favoring public safety prohibited reinstatement of auto mechanic discharged for failure to tighten customers' wheel lugnuts), *rev'd*, 886 F.2d 1200 (9th Cir. 1989) (en banc), *cert. denied*, 495 U.S. 946 (1990).

¹⁰⁴ This is how lower courts in the Sixth Circuit have addressed it. See, e.g., *Local 223, Utility Workers Union v. Detroit Edison Co.*, No. 89-CV-72065-DT, 1990 U.S. Dist. LEXIS 19708 (E.D. Mich. Sept. 6, 1990) (rejecting magistrate's recommended order and holding that award reinstating employee discharged for falsifying information did not violate the cited public policy "requiring the operation of a nuclear power plant in a safe manner"). A pre-*Interstate Brands* court came to a different conclusion, but its analysis did not survive that case. *Russell Memorial Hosp. Ass'n v. United Steelworkers*, 720 F. Supp. 583 (E.D. Mich. 1989) (award reinstating nurse discharged for negligent administration of medicine to patient violated Michigan's public policy of "ensuring safe and competent nursing care" as manifested through laws regulating the profession in general).

¹⁰⁵ Frank Easterbrook, *Arbitration, Contract, and Public Policy*, in *ARBITRATION 1991: THE CHANGING FACE OF THEORY AND PRACTICE* (Gladys W. Gruenberg ed., 1992), *quoted in* David E. Feller, *Court Review of Arbitration*, 43 *LAB. L.J.* 539, 543 (1992).

standard for dismissal of employees, then it in effect delegates to the arbitrator, subject to the conditions of the collective bargaining agreement, its authority to discharge employees. It does not matter that the employee himself has committed an improper or an illegal act.¹⁰⁶ Unless the employer itself could not lawfully retain the employee, then the arbitrator's award does not violate public policy. This approach, i.e., requiring the presence of a law or legal precedent as policy and then requiring that the award itself compel a violation of the policy, places it within the minority of the circuits. The Sixth Circuit, as noted by the above opinions, has explicitly rejected the broad approach, which takes otherwise lawful subjects out of the field of bargaining.¹⁰⁷

The court did not limit its holdings in *Interstate Brands*, *Monroe*, and *Shelby County* to reinstatement cases; those cases are derived from the position established initially in *W.R. Grace* and are geared to general subject matter applicability. *W.R. Grace* itself was not a reinstatement case, but dealt rather with seniority rights, another common provision in a collective bargaining agreement. Thus, the analysis used in those cases should be used in all public-policy cases, and in fact has been. These cases often involve issues much more important to the parties involved than the reinstatement of a given employee. This section looks at these other situations, some of them pre-*Interstate Brands*, in which an arbitrator's award enforcing these provisions was alleged to violate public policy.

One such situation is where an arbitrator's award is struck down as violating public policy because the award (and by necessary implication, the contract) runs afoul of the NLRA. This situation has occurred on a number of occasions and the court has been fairly consistent in its approach.

¹⁰⁶ See, e.g., *United Auto Workers, Local 771 v. Micro Mfg.*, 895 F. Supp. 170 (E.D. Mich. 1995) (finding no public policy violation where an arbitrator ordered reinstatement of an employee who had illegally assaulted owner of company); *Peabody Coal Co. v. United Mine Workers, Local Union No. 1188*, 120 L.R.R.M. (BNA) 2270 (S.D. Ohio 1985) (arbitration award reinstating employee found to have stolen company property is not contrary to public policy, even though employee surely violated criminal law). In an earlier, unpublished case in which the Sixth Circuit reviewed such misconduct, it used the *Interstate Brands* analysis, even though it predated that case. *Joseph & Feiss Co. v. Amalgamated Clothing and Textile Workers Union*, No. 87-3832, 1988 U.S. App. LEXIS 14898 (6th Cir. Nov. 8, 1988) (reinstatement of employee discharged for proven unemployment-compensation fraud did not violate a public policy, even though employee's conduct was illegal).

¹⁰⁷ See, e.g., *Premium Bldg. Prods. Co. v. United Steelworkers, Local Union No. 8869*, No. 85-3749, 798 F.2d 1415 (6th Cir. 1986) (table, text available in LEXIS) ("The company acknowledges that neither the district court nor this court can establish a per se ruling that anyone caught smoking marijuana at his workplace is subject to discharge in all cases."), *aff'g* 616 F. Supp. 512 (N.D. Ohio 1985).

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Essentially, an award that compels a party to violate the Act is unenforceable.¹⁰⁸ This situation can be litigated two ways. A party may refuse to submit a question to arbitration because it pertains to an illegal contract term. The Sixth Circuit has held that relief will be granted only "if the contract clause 'on its face violates federal labor law or is contrary to federal labor policy.' . . . Arbitration will not be precluded unless 'all possible interpretations of the contract provision would result in a conflict with federal labor law.'"¹⁰⁹ In other words, it must be clear that the arbitrator could not have read the language in such a way as to make the result of the language not illegal.

Because of this, in most of these situations, the obstinate party waits until after the award has been rendered before provoking a court challenge under public policy. In *Professional Administrators Ltd. v. Kopper-Glo Fuel*,¹¹⁰ a pre-*Interstate Brands* case, an employer challenged an arbitration award which affirmed the right of pension fund trustees to increase the amount of contributions the employer was required to make to the fund. The applicable collective bargaining agreement, as interpreted by the arbitrator, gave the trustees this power. The employer argued that the provision of the contract which purportedly allowed for this was unenforceable as against public policy. The Sixth Circuit, relying upon Supreme Court precedent defining the role of pension trustees, agreed stating that the trustees had usurped the power of the employer as to a mandatory subject of bargaining, in contravention of the NLRA.¹¹¹ The court held that it was of no importance that the employer had initially agreed to the provision.¹¹²

The court addressed the public-policy dimensions of delegated bargaining over mandatory subjects again in *Local 58, International Brotherhood of Electrical Workers v. Southeast Michigan Chapter, National*

¹⁰⁸ J.L. Foti Constr. Co. v. Laborers Int'l Union, Local No. 310, 742 F.2d 994, 1001 (6th Cir. 1984) (Kennedy, J., concurring) ("The agreement may not be enforced if to do so would violate the policy of the NLRA.") (citations omitted). This doctrine is also, of course, codified in the NLRA with respect to certain terms, e.g., hot cargo agreements: § 8(e) of the Act states that "any contract or agreement containing such an agreement shall be to such extent unenforceable and void." 28 U.S.C. § 158(e) (1995).

¹⁰⁹ *Communications Workers v. Michigan Bell Tel. Co.*, 820 F.2d 189, 193-94 (6th Cir. 1987) (citation omitted).

¹¹⁰ 819 F.2d 639 (6th Cir. 1987).

¹¹¹ *Id.* at 643 (citing Labor Management Relations Act, 29 U.S.C. § 158(d)); *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342 (1958) (§ 8(d) duty to bargain in good faith is limited to the subjects of wages, hours and other conditions of employment).

¹¹² *Professional Administrators*, 819 F.2d at 643.

Electrical Contractors Association.¹¹³ In this case, the court was confronted with a different award than was at issue in the previous cases, namely an interest arbitration award.¹¹⁴ The parties had reached an impasse in negotiations for a new contract, so, pursuant to the existing contract, an arbitrator was summoned to resolve the dispute. The arbitrator ruled in favor of the employer, and the union challenged the award, alleging, *inter alia*, that it violated public policy in two ways: first, that the arbitrator included two non-mandatory bargaining subjects in the new contract in violation of federal labor law;¹¹⁵ second, that the award created a new bargaining unit and imposed a collective bargaining agreement upon these workers without any showing of majority support for the union, again a violation of federal labor law.¹¹⁶ The union sought vacation of the award. The Sixth Circuit, as a preliminary matter, noted that the "framework of analysis" developed to guide the courts in reviewing grievance arbitration awards, i.e. the *Trilogy* and its progeny, "is applicable to interest arbitration with slight modification."¹¹⁷ This framework includes the necessity that an award not run counter to public-policy concerns.¹¹⁸ Using these tools to guide it, the court concluded first that the part of the interest arbitration award which produced the two items which were non-mandatory bargaining subjects did violate the public policy found in the Act, and thus would have to be removed.¹¹⁹ Next, the court found that the union's concerns as to its representation of employees who never expressed support for it did not violate the Act. In sum, only those provisions that violated the Act were excised, a continuation of the *Interstate Brands* principle.

This section has presented Sixth Circuit case law setting forth its view as to when courts may properly refuse to enforce an otherwise valid award

¹¹³ 43 F.3d 1026 (6th Cir. 1995).

¹¹⁴ Interest arbitration differs from grievance arbitration in that the former is used to resolve disputes between the parties as to what the terms of a new contract shall be, whereas the latter determines what the existing contract provides shall be done in a particular situation. See generally ELKOURI & ELKOURI, *supra* note 79, at 98-101 (discussing use of interest arbitration).

¹¹⁵ See *supra* note 113.

¹¹⁶ See *International Ladies' Garment Workers Union v. NLRB* (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 737 (1961) (an employer and union may not enter a contract with respect to workers who have not expressed majority support for the union as their bargaining representative).

¹¹⁷ *Local 58*, 43 F.3d at 1030.

¹¹⁸ *Id.* ("Our review is not complete, however, merely because an award survives a contractual analysis. We must also review the award in light of federal statutes.").

¹¹⁹ *Id.* at 1032-33. *Accord* *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1067 (1994) (same).

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on the grounds that it violates public policy. In essence, the court has adopted the narrow approach espoused by the D.C. and Ninth Circuits. Its reasons for doing so, seemingly out of character with its reputation, are explored in the next section.

IV. THE RISE OF THE SECOND TRILOGY AND ITS INFLUENCE ON THE PRESENT READING OF THE FIRST

In a recent article,¹²⁰ Professor David Feller explains the thinking that went into his and Arthur Goldberg's strategy as they prepared to argue the *Trilogy* cases for the Steelworkers in 1960, seeking judicial sanction for labor arbitration at a time when courts were skeptical or hostile to arbitration as a means of dispute resolution. While they considered relying upon the arbitration enforcement provisions of the FAA,¹²¹ they decided to use Section 301 of Taft-Hartley because of possible inapplicability of the FAA¹²² and because of judicial hostility to the FAA at that time. The "major thrust was on the difference between grievance arbitration and commercial arbitration. *Wilko* [v. *Swan*] and commercial arbitration cases, we argued, were irrelevant."¹²³ The argument was successful, of course, and a new era of labor relations was ushered in.

In the meantime, the judicial hostility to the FAA has disappeared, leading to an arbitration revolution in almost all other areas of the law. The source of this turnaround is a series of Supreme Court decisions that have broadened the scope and reach of the FAA and made it a powerhouse of a statute, reaching to contracts at the limits of congressional power under the Commerce Clause and finding nearly every claim it encounters arbitrable.¹²⁴ Gone are the days (like in 1960) when parties seeking judicial approval of arbitration avoided invoking the FAA because of the courts' poor perception of it; today, the Court speaks of a "liberal federal policy favoring arbitration agreements."¹²⁵ *Wilko* v. *Swan* was recently overruled, allowing for arbitration of statutory claims even in situations where there is

¹²⁰ David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, ARB. J., Sept. 1993, at 18.

¹²¹ 9 U.S.C. §§ 3, 4 (1994) (mandating that the federal courts enforce agreements to arbitrate and that they stay pending litigation).

¹²² See *supra* note 120 for discussion of this possible inapplicability.

¹²³ Feller, *supra* note 120, at 19.

¹²⁴ See Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983 - 1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996).

¹²⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

almost complete lack of any bargaining equality.¹²⁶ The Court is holding parties to the letter of their contractual bargain and will not step in to referee and help the party who has made a bad choice. The lower federal courts have followed the Supreme Court's lead in FAA cases and are reluctant to disrupt the terms of a contract.¹²⁷ Feller notes that in light of this "second *Trilogy*," the Supreme Court has mandated that lower courts give greater deference to arbitration in these other cases than to those arising under the *Trilogy*.¹²⁸

The answer to this differential treatment may stem from the different sources of law for each arbitration scheme and the underlying policies informing each.¹²⁹ Under the FAA, there is escape from arbitration only in situations where a party has not received a procedurally "pure" arbitration.¹³⁰ This is due to the centrality of contract concepts to the development of the FAA by the Supreme Court. In a recent article, Professor Richard Shell argues that the Supreme Court itself has become increasingly influenced by arguments derived from ideals of economic efficiency in contract, so much so that he asserts that the Court is more pro-contract than the *Lochner* Court.¹³¹ This, he posits, is the theory underlying the Court's strict development of the FAA and the limited ability of parties to escape their obligations under such a contract.¹³²

¹²⁶ E.g., *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (holding that a group of first-time investors, including some who did not speak English, were required to arbitrate claims that their broker violated federal securities laws because the contract they signed with the broker contained a hidden arbitration clause).

¹²⁷ See G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 483 (1993).

¹²⁸ Feller, *supra* note 105, at 542. See also Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 755 (1990) (same). But see Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1202-04 (1993) (suggesting that the FAA cases have developed along the lines of *Trilogy* concepts).

¹²⁹ But see Richard L. Trumka, *Keeping Miners Out of Work: The Cost of Judicial Revision of Arbitration Awards*, 86 W. VA. L. REV. 705, 714-15 (1984) (arguing that anti-labor sentiment in the federal judiciary is a prime cause of excessive judicial scrutiny of labor arbitration awards); Reinhardt, *supra* note 101, at 37-39 (same); LeRoy & Feuille, *supra* note 13, at 120 (suggesting the same, but with reservation).

¹³⁰ See *supra* note 28 (discussing grounds for escape).

¹³¹ Shell, *supra* note 127, at 436 ("When viewed as a single line of cases and placed in historical perspective, . . . the modern Court's approach to contract emerges as a well-integrated, even radical, aspect of its pro-market jurisprudence.").

¹³² *Id.* at 504-06.

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Under the *Trilogy*, by contrast, there is a body of ever-evolving federal common law which provides for escape in many more situations. The different law under the *Trilogy* is no doubt due to the fact that those cases were not concerned with eliminating litigation; rather, the concern was for peaceful co-existence of capital and labor.¹³³ Because there was no real congressional guidance, the courts developed the ground rules for the entire arbitration process as a matter of federal common law.¹³⁴ Over the years, of course, caselaw filled in the cracks that developed in the implementation of the *Trilogy*, the courts always mindful that the alternative to peaceful labor relations through collective bargaining and arbitration was industrial warfare, perhaps of the type which caused havoc in much of the country immediately following World War II.¹³⁵ With the passage of time, however, the thought of national commercial activity grinding to a halt due to labor unrest has become as alien to most judges as it is to most Americans. This is especially true as union density continues to decline.¹³⁶ Further, concepts like "industrial self-government"¹³⁷ have grown as alien to most people as have concepts of unions in general. The result of this has been a change over time in the courts' approach to labor arbitration; some

¹³³ *Warrior & Gulf Navigation Co.*, 363 U.S. at 578 ("In the commercial case, arbitration is the substitute for litigation. Here, arbitration is the substitute for industrial strife."); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 265 (1964) ("The underlying purpose of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process.").

¹³⁴ *Lincoln Mills*, 353 U.S. at 456 (stating that the courts were to develop a body of federal common law for labor arbitration).

¹³⁵ See, e.g., Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 369 n.60 (1984) (noting the severe economic turbulence caused by post-World War II strikes and how that figured into passage of Taft-Hartley).

¹³⁶ Unions represented only 10.4% of the private-sector work force in 1995. *Union Membership Drops 300,000 in 1995*, BNA Pensions & Benefits Daily, Feb. 14, 1996 (citing just-released Bureau of Labor Statistics study). For discussion of factors contributing to the decline in union representation since the peak in the 1940's, see generally GOLDFIELD *supra* note 7, at 115-217; GEOGHEGAN, *supra* note 8; Charles B. Craver, *Rearranging Deckchairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616 (1995) (book review) (discussing and critiquing differing rationales for the decline in union representation); Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871 (1987).

¹³⁷ *Warrior & Gulf Navigation Co.*, 363 U.S. at 581.

of the case law which came soon after the *Trilogy* has been modified in recent years as its inherent attractiveness has faded with its context.¹³⁸

While the *Trilogy* is dated,¹³⁹ the FAA by contrast is recent and is founded upon contract theory, a concrete foundation. Courts may be more likely to respond favorably to those concepts to which they can relate.¹⁴⁰ Further, it is not unreasonable to believe that there has been an intermingling of the arbitration doctrines at various points.¹⁴¹ This intermingling occurred in part with the *Misco* decision. In its aftermath, lower courts, in addition to citing it in labor cases, use it as the federal common law benchmark for defining the point at which they may disrupt contracts generally on policy grounds.¹⁴² This result is of course not unreasonable, given that this was what a fair reading of *W.R. Grace* and *Misco* conveys, and given that many labor scholars have urged that courts treat collective bargaining agreements as they would other contracts, in an attempt to regain deference.¹⁴³ This is the stance of the Sixth Circuit, which has been consistent in giving a narrow read to *Misco* in these other contexts.¹⁴⁴ Some other courts seem to employ a different, narrower reading of the case in the non-labor context, with the result that the terms of collective bargaining agreements are more likely to be stricken than are

¹³⁸ This seems especially true as regards the "essence" test of *Enterprise Wheel*, in that courts are less willing to allow arbitrators to broadly interpret contract language. This is perhaps a consequence of distrust of labor arbitration, but may also be due to allegiance to contract theory over *Trilogy* concepts, and a reluctance to impose additional contract terms on a party. See *supra* notes 131-33 and accompanying text (discussing this possibility). One result of this lack of shared context is that a patchwork of decisions exists—hardly a seamless web: "Review of arbitration decisions is one of the more difficult and standardless enterprises facing an appellate judge." *Lattimer-Stevens Co.*, 913 F.2d at 1170 (Boggs, J., dissenting).

¹³⁹ Estreicher, *supra* note 128, at 754 ("[T]he *Trilogy*'s model of labor arbitration is inseparable from the institution of collective bargaining, which is very much on the decline today.").

¹⁴⁰ Gottesman, *supra* note 78, at 90 (noting that many judges appointed since the early 1980's have had little exposure to arbitration awards and find the whole process foreign).

¹⁴¹ See, e.g., Malin & Ladenson, *supra* note 128.

¹⁴² See, e.g., *American Cas. Co. v. FDIC*, 39 F.3d 633, 637-39 (6th Cir. 1994) (contract case); *Board of County Comm'rs v. Kimball*, 860 F.2d 683, 686 (6th Cir. 1988) (non-labor FAA arbitration case).

¹⁴³ E.g., Summers, *supra* note 74. This represents a departure from the early interpretation of such agreements, e.g. Justice Douglas's flowery prose in the *Trilogy*.

¹⁴⁴ See, e.g., *American Cas. Co.* 39 F.3d at 637-39 (contract case); *Kimball*, 860 F.2d at 686 (6th Cir. 1988) (FAA arbitration case). Because of this consistency, the Court should be receptive to citation of these non-labor cases in the *Trilogy* context.

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terms of other contracts.¹⁴⁵ This double-usage of *Misco* may provide an answer to the Supreme Court's reluctance in setting forth a standard in *Misco*: namely that liberal justices were afraid that adoption of the union's position in that case would result in limiting judicial power to address the public's interest in curtailing private law-making in non-labor contexts.¹⁴⁶ If this was their concern, it has been realized.

The Sixth Circuit read *Misco* as being an important case, one more case in a long line which has sought to remind the lower courts that, when presented with a challenge to an arbitration award, their duty is not to do abstract justice, but rather, with limited exceptions, to enforce the award regardless of how repugnant the award may seem with respect to any objective or subjective standard.¹⁴⁷ It is the contention of this Note, however, that the position of the Sixth Circuit as regards public policy is one founded as much in contract as it is in the *Trilogy*. This puts the court, as regards philosophic justification, between the two camps favoring narrow review of awards:¹⁴⁸ the conservative school, whose representative is Judge Frank Easterbrook, and whose justification is almost purely contractual;¹⁴⁹

¹⁴⁵ *E. g.*, *Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236 (5th Cir. 1992) (reading *Misco* and policy narrowly in commercial setting). There is no reason, practically speaking, for less respect to be given to the provisions of a collective bargaining agreement. There is certainly much more equality of bargaining power in labor agreements than in many of the situations the Supreme Court has recently faced where it has ordered enforcement of the contract. If anything, employers, which typically are the challengers of labor awards, enjoy far greater bargaining power than do unions, whose power to strike and pressure employers has been dramatically reduced over the past decades. Why should courts operating under a conservative, pro-contract mindset find that the only time the public interest needs to be taken into account is when the noxious provision is found in a collective bargaining agreement? See also Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis in Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 767 (1985) (criticizing and rejecting theory of "contractualist labor law" as fundamentally misapprehending the inequality of bargaining power in collective bargaining relationships).

¹⁴⁶ *Cf. Misco*, 484 U.S. at 46 (Blackmun, J., concurring) ("Nor do I understand the Court to decide, more generally, in what way, if any, a court's authority to set aside an arbitration award on public policy grounds differs from its authority, outside the collective-bargaining context, to refuse to enforce a contract on public policy grounds. Those issues are left for another day.").

¹⁴⁷ See *Eberhard Foods v. Handy*, 868 F.2d 890, 891 (6th Cir. 1989) ("The Court again advised lower federal courts to be more deferential to the arbitration process.").

¹⁴⁸ Professor Vetter noted this seemingly unusual lineup in the late eighties. Jan Vetter, *Enforceability of Awards Post-Misco*, in *ARBITRATION 1988: EMERGING ISSUES FOR THE 1990's* 78-84 (Gladys W. Gruenberg ed., 1989).

¹⁴⁹ See Easterbrook, *supra* note 105.

and the liberal school, whose representative is Judge Harry Edwards, and whose justification is found in the national labor laws.¹⁵⁰

This section has attempted to explain what some might see as a position out of character for the Sixth Circuit—deference to labor arbitration awards. Regardless of how well deserved the court's reputation might be in deferring under *Enterprise Wheel*, it is clear that the court has staked out a deferential position in the public-policy debate. Knowing what might influence the court's decision-making, it is hoped, will help predict where it might go in the future.

V. CONCLUSION

The Sixth Circuit's interpretation of the public-policy exception may well represent a departure from its reputation as an *Enterprise Wheel*-skeptical, but as argued above it may demonstrate that the court is not anti-arbitration. Rather the court is more comfortable with one arbitration theory over another. Regardless, the court's cases make clear that the public-policy argument is not one to which the court will be overly receptive, and a review of recent challenged arbitration awards reveals that obstinate parties do not utilize this theory as often as is the practice in broad-review circuits such as the Third and Fifth.¹⁵¹

Regardless of one's position as to the propriety of the employee conduct and substantive contract terms challenged under these awards, it must be agreed that the status of collective bargaining agreements cannot be relegated behind that of other contracts. At the least, it must be first among equals. As it relates to public policy, the Sixth Circuit has acknowledged that.

Arlus J. Stephens

¹⁵⁰ See Edwards, *supra* note 71.

¹⁵¹ The advantage of a well defined, bright-line test for public policy is that those who bring improper suits designed to harass have less ability to hide behind a good faith-compliance shield when sanctions are requested. See *Monroe Auto Equip.*, 981 F.2d at 269-70 (noting that attorney's fees may be appropriate in an action to enforce if the obstinate party's position is without basis).